UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

ENTERGY NUCLEAR VERMONT YANKEE, LLC and ENTERGY NUCLEAR OPERATIONS, INC., Plaintiffs	)	
v.	)	Case No. 5:12-cv-206
PETER SHUMLIN, in his official capacity as GOVERNOR OF THE STATE OF VERMONT; WILLIAM SORRELL, in his official capacity as the ATTORNEY GENERAL OF THE STATE OF VERMONT; and MARY N. PETERSON, in her official capacity as the COMMISSIONER OF THE DEPARTMENT OF TAXES OF THE STATE OF VERMONT, Defendants	)	

PLAINTIFFS' MEMORANDUM OF LAW REGARDING JURISIDICTION AND OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Of Counsel:

Alan C. Gutierrez
Steven E. Goerner
Entergy Services, Inc.
2001 Timberloch Place, Suite 2N
The Woodlands, TX 77380
(281) 297-5540

Robert B. Hemley
Matthew B. Byrne
GRAVEL AND SHEA PC
76 Paul Street, 7th Floor
P.O. Box 369
Burlington, VT 05402-0369
rhemley@gravelshea.com
mbyrne@gravelshea.com
(802) 658-0220

Hollis L. Hyans
Robert A. Salerno
Thomas H. Steele
MORRISON & FOERSTER LLP
1290 Avenue of the Americas
New York, NY 10104-0050
(212) 468-8000

Attorneys for Plaintiffs Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

Plaintiffs Entergy Vermont Yankee, LLC ("ENVY") and Entergy Nuclear Operations, Inc. ("ENOI") (collectively "Plaintiffs" or "Entergy"), brought this action to protect their rights under the United States Constitution. Defendants have moved to dismiss, arguing that such "[c]hallenges to state taxes do not belong in federal court." Defendants' Motion to Dismiss and Memoranda of Law ("Def. Mot.") at 1.

Relying on the Tax Injunction Act ("TIA"), Defendants assert that this Court does not have jurisdiction to hear Plaintiffs' constitutional claims. Def. Mot. at 1. That argument is based on a simplistic reading of the TIA that ignores two critical predicates: the TIA only applies (1) *if* the imposition in question is really a "tax" for this specific purpose, *and* (2) *if* the imposition provides a "plain, speedy and efficient" remedy in the state's courts. Both of those all-important *ifs* must be present for the TIA to divest a federal court of jurisdiction. Neither is present here.

The case law applying the TIA makes clear that the use of tax lingo by the State does not work as a talisman to ward off federal court review. Although called a "tax," Vt. Stat. Ann. tit. 32 § 8661(a) (2012) (the "New Levy") bears few of the attributes of the types of impositions that courts consider to be taxes for purposes of the TIA. To the contrary, the New Levy is akin to impositions that have been held not to be "taxes"—regardless of what the State calls them. For example, the New Levy applies to a single "taxpayer." The New Levy was enacted as a purported tax in an attempt to force ENVY to continue making payments roughly equivalent to those made under contracts that have expired. Further, a substantial portion of the funds from the New Levy will go to finance the Clean Energy Development Fund ("CEDF"), thereby advancing a regulatory agenda. Finally, the New Levy was imposed on Entergy for improper punitive purposes as part of an ongoing effort to shut down the Vermont Yankee Nuclear Power

Station, which Plaintiffs own and operate. Under the case law, the facts alleged in the Complaint—which must be accepted as true at this stage of the proceedings—lead to the conclusion that the New Levy is not a tax and the TIA does not apply here.

The other TIA prerequisite—a plain remedy in a state court—is also lacking because no such remedy is provided under Vermont law. The administrative procedures on which Defendants rely do not apply to the New Levy. Even if such procedures did apply to the New Levy, they do not lead to a plain remedy in state court.

Defendants also raise a non-jurisdictional ground for dismissal. They argue that this Court should refrain from hearing this case under the discretionary doctrine of comity. However, no interference with general state revenue procedures is raised by a challenge to the New Levy. It applies to only one entity, and there is no state court to which the federal court could even consider deferring. Accordingly, there is no basis for this Court to decline to hear federal questions over which it has jurisdiction.

This Court should deny Defendants' Motion to Dismiss and consider Plaintiffs' Motion for a Preliminary Injunction.

STATEMENT OF FACTS

As set forth in the Complaint, the following factual allegations[1] are relevant to Defendants' Rule 12(b)(1) challenge to this Court's jurisdiction:

Vermont Yankee Station, located in Vernon, Vermont, is one of New England's most important suppliers of electric energy. Its capacity of over 600 megawatts of power is almost 12 times the capacity of the next largest generator in the State. It employs over 600 people. Compl. ¶ 20.

[1] All factual allegations in the Complaint and cited herein are supported by evidence attached to the Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction.

During the period 2003 through 2012, pursuant to certain contracts between Entergy and the State, Entergy made payments totaling over $30 million, over half of which were earmarked for the CEDF, which was established by the General Assembly to receive and dispense funds from Entergy for the development and deployment of renewable energy and alternatives to nuclear energy. Compl. ¶ 21.

Vermont Yankee Station sells the power it generates on the wholesale interstate market. Since March 21, 2012, Vermont Yankee Station has sold power exclusively to out-of-state consumers because Vermont's utilities no longer purchase power from Entergy. Compl. ¶ 22.

Entergy's Agreements with Vermont Agencies Regarding Its Operation

In 2001, Vermont Yankee Nuclear Power Corporation[2] invited bids for Vermont Yankee Station. Entergy successfully bid to acquire the plant and participated in ten-month-long proceedings before the Vermont Public Service Board ("PSB"), requesting a Certificate of Public Good to own and operate the plant. Compl. ¶ 24. On June 13, 2002, the PSB approved the sale of Vermont Yankee Station to Entergy. Compl. ¶ 25.

In its order approving the sale, the PSB found that "Vermont utilities had obtained a power purchase agreement through 2012 for approximately 55 percent of Vermont Yankee Station's output, under a formula which ensured Vermonters rates lower than the estimated operating costs over the remaining license term." Compl. ¶ 26. ENVY is authorized by the Federal Energy Regulatory Commission ("FERC") to sell power into the ISO New England interstate market at market-based rates. Compl. ¶ 27. "ISO New England is a non-profit independent system operator, regulated by FERC, which administers New England's wholesale

[2] Vermont Yankee Nuclear Power Corporation is a joint venture including certain Vermont retail utilities. Compl. ¶ 23.

electricity markets." *Entergy Nuclear Vermont Yankee LLC v. Shumlin*, 838 F. Supp. 2d 183, 192 (D. Vt. 2012) (Murtha, J.) (hereinafter "*Entergy I*").

On February 21, 2003, Entergy sought approval from the PSB to modify Vermont Yankee Station to increase the power output by up to 20 percent ("Uprate"). Compl. ¶ 28. On or about November 2003, as part of its effort to obtain approval for the Uprate, Entergy entered into a Memorandum of Understanding with the Vermont Department of Public Service ("DPS"), "under which [DPS] agree[d] to support the power uprate and Entergy commit[ted] to pay approximately $6 million of payments to the state of Vermont and establish some protection for ratepayers in the event that the uprate reduce[d] the reliability of Vermont Yankee" (the "2003 MOU").[3] *Entergy I*, 838 F. Supp. 2d at 193; Compl. ¶ 29. On March 15, 2004, the PSB approved the Uprate. Compl. ¶ 30. Entergy's payments under the 2003 MOU have totaled over $15 million. Compl. ¶ 29.

Although the United States Department of Energy ("DOE") had agreed, in a Standard Contract pursuant to 42 U.S.C. § 10222, to remove the spent nuclear fuel produced by Vermont Yankee Station, the DOE breached its obligations under the contract and failed to accept and remove the spent nuclear fuel. *See Vermont Yankee Nuclear Power Corp. v. United States*, 683 F.3d 1330, 1336 (Fed. Cir. 2012), *reh'g denied* (Oct. 1, 2012) (hereinafter "*Federal Damages Action*"); Compl. ¶ 31. Accordingly, Entergy was forced to make alternate arrangements to store the spent nuclear fuel on-site until such time as the DOE removes it in accordance with the Standard Contract. Compl. ¶ 31. Consequently, on March 10, 2005, Entergy proposed legislation to the General Assembly for the limited purpose of permitting it to seek approval

[3] Mar. 15, 2004 PSB Order in Dkt. No. 6812 at 3, *available at* http://www.state.vt.us/psb/orders/2004/files/6812fnl.pdf.

from the PSB to construct a dry fuel storage facility for spent nuclear fuel at Vermont Yankee Station. Compl. ¶ 32.

On June 21, 2005, the governor signed into law Act 74, which added sections 6521, 6522, and 6523 to title 10 of the Vermont Statutes. Section 6522 authorized Vermont Yankee Station to seek approval from the PSB to construct a dry fuel storage facility. 2005 Vt. Acts & Resolves No. 74; Compl. ¶ 33. Also on June 21, 2005, in order to obtain passage of Act 74 and, ultimately, to obtain approval to construct the dry fuel storage facility, Entergy entered into a Memorandum of Understanding with DPS ("2005 MOU"), which required Entergy to make quarterly payments to the CEDF for the period beginning January 1, 2006 and "ending March 31, 2012," with a "total" amount of $15,625,000. Compl. ¶ 34.

Act 74 also created the CEDF. Vt. Stat. Ann. tit. 30 § 8015 (formerly codified at Vt. Stat. Ann. tit. 10 § 6523). The purpose of the CEDF is "to promote the development and deployment of cost-effective and environmentally sustainable electric power and thermal energy or geothermal resources for the long-term benefit of Vermont consumers, primarily with respect to renewable energy resources, and the use of combined heat and power technologies." Vt. Stat. Ann. tit. 30 § 8015(c); Compl. ¶ 35.

Act 74 provided that the CEDF would receive payments made by Entergy pursuant to the 2003 MOU, relating to the Uprate, as well as the payments made by Entergy pursuant to the 2005 MOU, relating to the dry fuel storage facility (collectively, the "Contract Payments"). Compl. ¶ 35. On April 26, 2006, the PSB approved the construction of the dry fuel storage facility. Compl. ¶ 36.

Over the period 2003 through 2012, Entergy made Contract Payments of over $30 million. Entergy has satisfied its obligations under the 2003 and 2005 Memoranda of Understanding (together the "MOUs"). Compl. ¶ 37.

Because payments under the 2005 MOU were made to obtain approval from the State for the construction of a storage facility for spent nuclear fuel, which was necessary only because the federal government had breached its contract to remove spent nuclear fuel from Vermont Yankee Station, Entergy sought reimbursement for the 2005 MOU payments, among other damages incurred, in a lawsuit against the federal government. Compl. ¶ 38. The United States Court of Appeals for the Federal Circuit held that Entergy's payments to the State pursuant to the 2005 MOU were not reimbursable by the federal government, calling the 2005 MOU payments "a form of blackmail for the state approval of the construction" of the Plaintiffs' dry cask storage facility. *Federal Damages Action*, 683 F.3d 1330, 1345; Compl. ¶ 39. The Federal Circuit noted that the 2005 MOU payments bore "no relationship to any costs incurred by the state or its citizens as a result of the construction of the dry storage facility." *Id.*; Compl. ¶ 39.

The General Assembly's Prior Efforts to Shut Down Vermont Yankee Station

Beginning in 2006, the General Assembly took a series of steps to attempt to force Vermont Yankee Station to shut down in March 2012. Compl. ¶ 40. On May 18, 2006, the governor signed into law Act 160, which forbade the PSB's issuance of a Certificate of Public Good for the continued operation of the plant, unless the General Assembly first approved such issuance. 2006 Vt. Acts & Resolves No. 160 ("Act 160"); Vt. Stat. Ann. tit. 30 § 248(e)(2); Compl. ¶ 40. Accordingly, the General Assembly gave itself the authority to prevent Vermont Yankee Station from renewing the Station's Certificate of Public Good. Compl. ¶ 40.

On February 19, 2010, the Vermont Senate Finance Committee introduced Senate Bill 289, which would have approved the continued operation of Vermont Yankee Station for an additional 20 years after March 21, 2012. Compl. ¶ 41. On February 24, 2010, the Vermont Senate voted against continued consideration of Bill 289. By voting against Bill 289, the Senate blocked approval for Vermont Yankee Station's Certificate of Public Good for the continued operation of Vermont Yankee Station. Compl. ¶ 42. Since February 2010, the General Assembly has not taken any further action to approve the continued operation of Vermont Yankee Station, and the PSB has not issued a renewed Certificate of Public Good to Vermont Yankee Station. Compl. ¶ 43.

On May 11, 2011, the General Assembly passed Act 47. *See* 2011 Bill Text VT H.B. 56 (Lexis); 2011 Vt. Acts & Resolves No. 47 ("Act 47"). Commonly referred to as a "bill back" provision, section 20n of Act 47 amended Vt. Stat. Ann. tit. 30, § 20 to read:

> (a)(1) The board or department may authorize or retain legal counsel, official stenographers, expert witnesses, advisors, temporary employees, and other research services:... (i) to assist the board or department in any proceeding listed in subsection (b) of this section; . . . .
>
> (b) Proceedings, including appeals therefrom, for which additional personnel may be retained are: . . .
>
> (15) proceedings before any state or federal court concerning a company holding or a facility subject to a certificate issued under this title if the proceedings may affect the interests of the state of Vermont. Costs under this subdivision (15) ***shall be charged to the involved company*** pursuant to subsection 21(a) of this title.

(Emphasis added.)

While this provision was written broadly, it was passed to specifically apply to Plaintiffs, and allowed the State to "bill back" legal costs that the State would incur in defending certain litigation brought by Plaintiffs whether Plaintiffs were successful or not. The only purpose for

which the law could have been enacted was to discourage Plaintiffs from prosecuting their legal rights in court, or to retaliate against and/or punish them for having done so.[4]

The January 19, 2012 Injunction

On April 18, 2011, Entergy filed suit in *Entergy I* to enjoin Vermont officials from enforcing the requirement in Act 74 and Act 160 that Vermont Yankee Station obtain legislative approval to continue operating beyond March 21, 2012. Compl. ¶ 45. Entergy also sought to enjoin the defendants from conditioning Vermont Yankee Station's continued operation after March 21, 2012, on ENVY's agreement to provide below-market wholesale electricity rates to Vermont retail utilities.

On January 19, 2012, Judge Murtha issued an order permanently enjoining the defendants "from enforcing Act 160 by bringing an enforcement action, or taking other action, to compel Vermont Yankee to shut down after March 21, 2012 because it failed to obtain legislative approval (under the provisions of Act 160) for a Certificate of Public Good for continued operation," and "from conditioning the issuance of a Certificate of Public Good for continued operation on the existence of a below-wholesale-market power purchase agreement between Plaintiffs and Vermont utilities, or requiring Vermont Yankee to sell power to Vermont utilities at rates below those available to wholesale customers in other states." *Entergy I*, 838 F. Supp. 2d at 243;[5] Compl. ¶ 47.

---

[4] "[I]t's clear from the legislative history that the bill was targeted at Entergy in the midst of a highly publicized and controversial law suit." Cheryl Hanna, *Vermont Likely to Foot Legal Bill No Matter Who Wins*, Vermont Yankee Lawsuit (July 18, 2011), *available at* http://vtyankeelawsuit.vermontlaw.edu/july-8-2011-cheryl-hanna-vermont-likely-to-foot-legal-bill-no-matter-who-wins/) (retrieved October 7, 2012).

[5] On February 18, 2012, the defendants in *Entergy I* filed a Notice of Appeal.

The Legislation Directed at Vermont Yankee Station

In March 22, 2012, the Vermont House Committee on Ways and Means introduced Bill 782, titled "An Act Relating to Miscellaneous Tax Changes for 2012," which included an amendment to create the New Levy, and applied only to Vermont Yankee Station. Compl. ¶ 48. On May 15, 2012, the Governor signed Bill 782, which is codified at 2011 Vt. Acts & Resolves No. 143 ("Act 143"). Compl. ¶ 49.

The New Levy is imposed on "electric generating plants constructed in the state subsequent to July 1, 1965, and having a name plate generating capacity of 200,000 kilowatts, or more, . . . at the rate of $0.0025 per kWh of electrical energy produced." Vt. Stat. Ann. tit. 32 § 8661(a); Act 143, § 58. Compl. ¶ 50. Vermont Yankee Station is the only electric generating plant in Vermont, built subsequent to July 1, 1965, with a name plate generating capacity of 200,000 kilowatts or more and thus is the only plant subject to the New Levy. Compl. ¶ 51. Indeed, at the time it passed Act 143, the General Assembly knew and intended that the New Levy would be applicable only to Vermont Yankee Station. Compl. ¶ 52. The General Assembly estimated Entergy's liability under the New Levy to be $12.8 million annually, which is approximately two and one-half times greater than the Prior Levy (as defined in Compl. ¶ 6). Compl. ¶ 52.

The stated purpose of the New Levy is to replace the Contract Payments by generating total payments from Entergy roughly equivalent to the amounts paid by Entergy under the Prior Levy plus the amount of the Contract Payments. Compl. ¶ 53.

In various public statements, the General Assembly expressly asserted that House Bill 782 was designed to replace the expired Contract Payments. Those Contract Payments, of course, were made in return for favorable action by the State on the Uprate and dry fuel storage

petitions. During a Conference Committee Hearing held on March 16, 2012, legislators made the following statements regarding the intended purpose of the New Levy:

> UNIDENTIFIED MALE SPEAKER:[6] They're no longer paying into the Clean Energy Development Plan … so this would pick up for that lost revenue. But rather than … trying to recreate the clean energy development structure, we're just using the existing tax structure.

Cho ¶ 9, Ex. 8 (Tr. of Mar. 16, 2012 Hearing (CD 12-167) at 80:8-9, 11-15).[7]

> REPRESENTATIVE MASLAND: … it replaces the MOUs that we won't have.

Cho ¶ 9, Ex. 8 (Tr. of Mar. 16, 2012 Hearing (CD 12-167) at 84:17-18).

Similarly, Molly Bachman, of the Vermont Department of Taxes, testified as follows before the Senate Finance Committee on April 18, 2012:

> MS. MOLLY BACHMAN: … you know, with the MOUs there leaves a huge hole in the budget and this is to – an attempt to have the plant shoulder the same burden, the same portion of the budget as it does now.

Cho ¶ 11, Ex. 10 (Tr. Apr. 18, 2012 Hearing (CD 12-118) at 14:6-9).

> MS. MOLLY BACHMAN: The tax burden is more but the total burden for support of government services is the same because I think, as I understand it, the MOUs did – they paid about 6 million, 7 million under the MOUs, so that's what I mean by burden.

Cho ¶ 11, Ex. 10 (Tr. Apr. 18, 2012 Hearing (CD 12-118) at 15:5-9).

With the expiration of the Contract Payments in May 2012, the CEDF would have no sure source of money. Vt. Stat. Ann. tit. 30 § 8015(a)(1). In fact, the CEDF had anticipated that the fund would only "receive payments from Entergy through 2012." CEDF Strategic Plan,

---

[6] Upon information and belief, the speaker was Representative Oliver K. Olsen.

[7] "Cho ¶ __, Ex. __" refers to the Declaration of Jeanne Cho and the specific exhibit thereto, which were submitted in support of Plaintiffs' Motion for Preliminary Injunction. When cited herein, such evidence is used to amplify allegations in the Complaint on points that may be helpful to the Court in connection with the issues raised by Defendants' Rule 12(b)(1) motion.

2007, p. 2.[8] For that reason, the General Assembly created a new stream of income to recapture the revenue that was lost by the expiration of the Contract Payments.

Funds collected from Plaintiffs under the New Levy are deposited into the general fund in the first instance, then a portion is appropriated to the CEDF. For fiscal year 2013, the amount of the New Levy appropriated to the CEDF is $3 million. 2011 Vt. Acts & Resolves No. 162 (H.B. 781) § D.108(a)(2); H.B. 782 2012 Miscellaneous Tax Bill Fiscal Estimates Conference Committee Report, Sec. 58.

A report prepared for the State of Vermont Emergency Board and Legislative Joint Fiscal Committee confirms that the primary fiscal effect of the additional funds raised by the New Levy is to fund the CEDF:

> Statutory changes recently enacted to the electric energy tax, which affects only Vermont Yankee, will result in higher recorded revenues in the Source and Available General Funds, *but no additional budgetary benefit*, since most funds in excess of the prior electric energy tax will be appropriated to the Education Fund and the Clean Energy Development Fund.

"July 2012 Economic Review and Revenue Forecast Update" prepared by Kavet, Rockler & Associates, LLC, dated July 20, 2012, p. 15 (emphasis added), *available at* http://www.leg.state.vt.us/jfo/jfc/2012/2012_07_20/2012_07_20_Revenue_Update_Kavet.pdf.

One legislator was apparently concerned about imposing a "tax" to replace the Contract Payments, expressly recognizing that the Contract Payments had been in exchange for favorable State regulatory action:

> UNIDENTIFIED MALE SPEAKER:[9] I mean, the MOUs that were reached before were under pretty specific, you know, conditions where it was sort of a quid pro quo for, you know, we

[8] *Available at* http://publicservice.vermont.gov/energy-efficiency/ee_files/cedf/CEDF%20Strategic%20Plan.pdf.

[9] Upon information and belief, the speaker was Representative Oliver K. Olsen.

> want to do this and, well, you know, we'll agree to let you pay that and I'm not sure that's going to happen.

Cho ¶ 9, Ex. 8 (Tr. of Mar. 16, 2012 Hearing (CD 12-167) at 85:15-20).

During the General Assembly's consideration of the imposition of the New Levy on ENVY, the General Assembly was advised that the New Levy could be subject to challenge. Compl. ¶ 54. For example, Scott Kline, of the Environmental Protection Division at the Attorney General's Office, testified as follows:

> I do want to say that even with this version, given the current circumstances which include the pending federal court litigation, the decision from the district court which is now on appeal and the ongoing proceedings at the Public Service Board, there is a risk associated within [sic] increasing a bill that would increase the generating tax at this time.

Cho ¶ 11, Ex. 10 (Tr. of Apr. 18, 2012 Hearing (CD 12-118) at 24:5-11).

By calling the New Levy a "tax" and imposing it only on electricity generated by Vermont Yankee Station, Defendants seek to forcibly extend the payment obligations under the expired MOUs and extract payments comparable to the Contract Payments, but without providing any consideration to Entergy in return. Indeed, the General Assembly expressly contemplated that the New Levy would require Entergy to continue to make payments roughly equivalent to the Contract Payments, in spite of the fact that the MOUs have expired.

In sum, the New Levy is part and parcel of a pattern of punitive legislative acts to advance a regulatory agenda through the imposition of an exaction that is imposed solely on ENVY and requires ENVY to continue to pay amounts previously paid pursuant to the MOUs by relabeling the Contract Payments as "taxes."

ARGUMENT

The Complaint alleges that this Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and 28 U.S.C. § 1332 (diversity jurisdiction).

Compl. ¶¶ 15, 16. Defendants do not contest these bases of jurisdiction. Rather, Defendants have filed a motion pursuant to Rule 12(b)(1) which argues that Plaintiffs' claims are barred by the Tax Injunction Act and the principles of federal-state comity. Neither ground has merit.

I. THE TAX INJUNCTION ACT DOES NOT DIVEST THIS COURT OF JURISDICTION

The TIA provides that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341.

The case law is clear that the TIA does not deprive a federal court of jurisdiction simply because the State chooses to call the challenged exaction a "tax." Whether a charge is a tax for purposes of the TIA is determined as a matter of federal law, rather than by the "Legislature's chosen moniker." *IMS Health, Inc. v. Sorrell*, 2008 U.S. Dist. LEXIS 47454, at *8 (D. Vt. June 17, 2008), *rev'd and remandedd on other grounds*, 630 F.3d 263 (2d Cir. 2010), *aff'd*, 131 S. Ct. 2653 (2011). *See also Robinson Protective Alarm Co. v. City of Philadelphia*, 581 F.2d 371, 374 (3d Cir. 1978).

Further, the TIA requires that a "plain" remedy be available in the courts of the state. Notwithstanding oral representations by Defendants,[10] Vermont law does not clearly provide a

[10] While Defendants may argue accordingly, the representations of Defendants' counsel cannot, in and of themselves, form the basis for the jurisdiction of a Vermont court nor provide the court with the power to grant remedies. Under the Vermont Constitution, the Vermont legislative branch, not its executive branch, possesses the sole authority for prescribing the jurisdiction of all Vermont courts. Vt. Const. §§ 30 and 31. Additionally, Defendants' representations cannot create a right to appellate review of administrative processes where the Vermont General Assembly has not provided such a right. *Mason v. Thetford Sch. Bd.*, 142 Vt. 495, 498 (1983) ("We have held on many occasions that there is no absolute right to appellate review of administrative decisions. Moreover, the legislature has the power, in the absence of any constitutional requirement, to deny such review") (internal citations omitted).

state court review of tax statutes alleged to be unconstitutional nor does Vermont law provide a mechanism for a refund of payments made under the New Levy.

Unless both of these prongs are met, the TIA does not divest a federal court of jurisdiction. As explained below, neither prong of the TIA is met in this case. Indeed, in these circumstances, a federal court is the *only* venue for adjudication of the federal constitutional issues raised in the Complaint.

A. The New Levy Is Not the Type of Exaction That Courts Consider to Be a Tax Under the Tax Injunction Act

1. The Test Used by Federal Courts for Determining Whether an Exaction Is a Tax

The starting point for the determination of whether a charge constitutes a "tax" for purposes of the TIA is *San Juan Cellular Telephone Co. v. Public Service Commission*, 967 F.2d 683 (1st Cir. 1992). *IMS Health, Inc.*, 2008 U.S. Dist. LEXIS 47454, at *9.

In *San Juan Cellular Telephone Co.*, then-Chief Judge Breyer explained:

> [Courts] have sketched a spectrum with a paradigmatic tax at one end and a paradigmatic fee at the other. The classic "tax" is imposed by a legislature upon many, or all, citizens. It raises money, contributed to a general fund, and spent for the benefit of the entire community. The classic "regulatory fee" is imposed by an agency upon those subject to its regulation. It may serve regulatory purposes directly by, for example, deliberately discouraging particular conduct by making it more expensive. Or it may serve such purposes indirectly by, for example, raising money placed in a special fund to help defray the agency's regulation-related expenses.

Id. at 685 (citation omitted).

Courts applying the *San Juan Cellular* test consider the following three factors: (1) what entity imposes the charge; (2) what population is subject to the charge; and (3) whether the charge is expended for general public purposes, or used for the regulation or benefit of those upon whom the assessment is imposed. *Collins Holding Corp. v. Jasper Cnty.*, 123 F.3d 797,

800 (4th Cir. 1997); *Neinast v. Texas*, 217 F.3d 275, 277-278 (5th Cir. 2000); *Hedgepeth v. Tennessee*, 215 F.3d 608, 611-14 (6th Cir. 2000); *Hager v. City of W. Peoria*, 84 F.3d 865, 870-72 (7th Cir. 1996); *Bidart Bros. v. Cal. Apple Comm'n*, 73 F.3d 925, 931-932 (9th Cir. 1996); *IMS Health, Inc.*, 2008 U.S. Dist. LEXIS 47454, at *9-12.[11]

The courts do not, however, apply these factors mechanically. Rather, "the cases . . . take a practical and sensible approach. They do not apply a set of rigid rules or elements and then reach a mechanical conclusion." *Hexom v. Or. Dep't of Transp.*, 177 F.3d 1134, 1137 (9th Cir. 1999). According to the Ninth Circuit in *Hexom*, "when we are considering the more elusive cases, which are nearer to the midpoint between the paradigmatic tax and the paradigmatic regulatory fee, the [*San Juan*] factors . . . were simply the primary ones." *Id. See also ACLU of Ill. v. White*, 692 F. Supp. 2d 986, 990 (N.D. Ill. 2010) (finding that *San Juan Cellular* "did not hold that these three factors constitute an exhaustive framework for determining whether the TIA applies to a given assessment").

Recently, Judge Murtha applied this framework when deciding that Vermont legislation imposing an exaction on pharmaceutical companies was not a tax within the meaning of the TIA and, therefore, that the District Court was not divested of jurisdiction. *IMS Health, Inc.*, 2008 U.S. Dist. LEXIS 47454, at *9. The Court began by quoting the *San Juan Cellular* test and listing the three factors, and then went on to explain:

> Not surprisingly, black and white cases falling at the outer poles of the spectrum are rare, with the majority of cases falling instead "into the gray area in the center of the spectrum." When courts find themselves in this gray area, they tend to add color by

[11] In *Travelers Insurance Co. v. Cuomo*, 14 F.3d 708, 713 (2d Cir. 1993), *rev'd on other grounds sub nom by N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645 (1995), which was decided shortly after *San Juan Cellular* was decided, the Second Circuit followed and quoted from *San Juan Cellular*, but without expressly setting out the three prongs often applied by courts considering this issue.

> emphasizing "the revenue's ultimate use, asking whether it provides a general benefit to the public, of a sort often financed by a general tax, or whether it provides more narrow benefits to regulated companies or defrays the agency's costs of regulation."

Id., at *10 (citations omitted).

When considering ultimate use, courts recognize that "[r]ather than a question solely of *where* the money goes, the issue is *why* the money is taken." *Hager*, 84 F.3d at 870-71. *See also Chamber of Commerce of the United States v. Edmondson*, 594 F.3d 742, 762 (10th Cir. 2010); *Hexom*, 177 F.3d at 1138; and *Collins Holding Corp*, 123 F.3d at 800-01.

Finally, although courts sometimes employ a "tax versus regulatory fee" analysis in the context of the TIA, the plain language of the TIA only bars claims relating to "any tax under State law." 28 U.S.C. § 1341. The TIA does not carve out an exception for regulatory fees, nor does it define a "tax" as something "other than" a regulatory fee. For that reason, the Ninth Circuit in *Hexom* explained that the focus on regulatory fees under the TIA "tends to misdirect attention from the fact that the pole opposite the 'classic tax' is really something more like the 'classic non-tax.'" *Hexom*, 177 F.3d at 1137-38. "[A]s used in this area, regulatory fee is simply a phrase used to juxtapose tax and non-tax assessments." *Id.* at 1137. Other courts have noted that some fees neither are true classic taxes nor are used to "regulate conduct in the usual sense of that term." *Trailer Marine Transp. Corp. v. Rivera Vazquez*, 977 F.2d 1, 5 (1st Cir. 1992). *See also ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 375 (6th Cir. 2006) ("It does not follow, in other words, that if 'the charge is not a regulatory fee . . . it must be a tax.'") (quoting dissent in *Henderson v. Stalder*, 434 F.3d 352, 355 (5th Cir. 2005)). In particular, payments under a contract do not constitute a "tax" for purposes of the TIA. *Id.* at 373-74.

Accordingly, "even though distinguishing assessments covered by the TIA from those not covered is often characterized as a determination of whether an assessment is a 'tax' or a

regulatory 'fee,' the ultimate question remains whether an assessment is a 'State tax.'" *Bidart Bros.*, 73 F.3d at 933 (quoting *San Juan Cellular*, 967 F.2d at 685). Thus, if the New Levy is not a tax for purposes of the TIA, then the TIA does not divest this Court of jurisdiction.

2. Application of the *San Juan Cellular* Test Demonstrates That the New Levy Is Not a Tax

Defendants correctly recognize that when deciding a motion to dismiss under Rule 12(b)(1), the Court must take all facts alleged in the complaint as true and draw all reasonable inferences in favor of the plaintiff. Def. Mot. at 4. *See Jimmo v. Sebelius*, 2011 U.S. Dist. LEXIS 123743, at *10-11 (D. Vt. Oct. 25, 2011) (when deciding a Rule 12(b)(1) motion "at the pleading stage" before any "evidentiary hearings have been held," the court "must accept as true all material facts alleged in the [Amended C]omplaint and draw all reasonable inferences in [Plaintiffs'] favor") (citing *Conyers v. Rossides*, 558 F.3d 137, 143 (2d Cir. 2009) (internal quotation marks and citation omitted)). Defendants are incorrect, however, that this case should be dismissed.

"Applying the San Juan factors and emphasizing the revenue's ultimate use," *IMS Health, Inc.*, 2008 U.S. Dist. LEXIS 47454, at *11, it becomes clear that, on the face of the Complaint, the New Levy is, in fact, not a "tax" for purposes of the TIA.[12]

a. What Entity Imposes the Charge?

The first prong of *San Juan Cellular* asks what entity imposes the charge. Here, the New Levy was passed by the Vermont General Assembly and will ostensibly be administered by the Department of Taxation. However, the Tenth Circuit has recognized that the fact that a state uses its tax system to collect revenue does not transform the charge at issue into a "tax."

[12] Citations herein to evidence are intended to amplify certain allegations in the Complaint. To the extent that the Court wishes to rely on such evidence in deciding this Rule 12(b)(1) motion, Plaintiffs can amend the Complaint to include such information.

Chamber of Commerce, 594 F.3d at 764 n.22. Rather, the court has to "inquire into the statute's purpose." *Id.* At least with respect to the portion of the New Levy that will fund the CEDF, the real "agency-in-interest" is the Vermont Department of Public Service, which administers the CEDF.

b. What Population Is Subject to the Charge?

The second prong of *San Juan Cellular* asks what population is subject to the charge. Here, the population subject to the New Levy is a single entity: ENVY, the owner of Vermont Yankee Station. An exaction borne by one entity is at the opposite end of the spectrum from the "classic" tax imposed "upon many or all citizens." *San Juan Cellular*, 967 F.2d at 685. *See also IMS Health, Inc.*, 2008 U.S. Dist. LEXIS 47454, at *11 (finding that a charge "only imposed on a narrow class of pharmaceutical manufacturers, [is] a far cry from the classic tax that is levied on many, or all, citizens").

The New Levy is materially indistinguishable from the exaction in *GenOn Mid-Atlantic, LLC v. Montgomery County, Maryland*, 650 F.3d 1021 (4th Cir. 2011), which held that an "excise tax" to be paid by an electricity generating facility was not a tax under the *San Juan Cellular* test. The "excise tax" of $5 per ton was imposed by the county on any entities that emitted over 1 million tons of carbon dioxide in a year. *Id.* at 1022. The revenue generated was to be deposited in the county's general fund, with 50% earmarked for funding greenhouse gas reduction programs and 50% for the county's general use. *Id.* at 1024 GenOn operated the only electricity generating plant in the county projected to exceed carbon emissions of 1 million tons annually and was, therefore, the only entity that was likely to be subject to the "excise tax." *Id.* at 1022-23.

While acknowledging that the "excise tax" on carbon emissions "does bear some of the indicia of a tax," the Fourth Circuit, applying the same factors as those relied upon in *San Juan*

Cellular, was able to "readily conclude" that the "excise tax" was not a tax for purposes of the TIA. *Id.* at 1024 (citation omitted). The "chief problem" with the county's "excise tax" was that the burden fell only on GenOn. *Id.* The Fourth Circuit reasoned that "[t]he fact that this charge affects the narrowest possible class is compelling evidence that it is a punitive fee rather than a tax." *Id.* According to the Fourth Circuit, "[i]t would be an extraordinary tax that applied only to one taxpayer—so extraordinary, in fact, that Montgomery County has been unable to identify even one exaction that applies only to a single entity that has been held a tax for purposes of the Tax Injunction Act." *Id.* Likewise, of all the energy generators in Vermont, the New Levy only applies to electricity generated by Vermont Yankee Station.

Another significant similarity between GenOn and Entergy is that GenOn was not able to pass the "excise tax" to its customers because its power was sold via competitive auction. *Id.* at 1023. Similarly, Entergy sells at market-based rates that are determined by a competitive market process. Potkin ¶¶ 18 and 19.[13]

By itself, the single-payor feature of the New Levy should preclude any finding that the New Levy is a "tax."

c. What Purposes Are Served by the Use of the Monies Obtained by the Charge?

The third prong of *San Juan Cellular* examines the use of the revenue obtained by the charge. Under this prong, the fact that some part of the collected revenue goes to a state's general fund does not indicate the charge is a "tax." Once again, *GenOn* is instructive.

In *GenOn*, 50% of the monies obtained by the "excise tax" were dedicated to the county's general fund and the remainder was earmarked for the county's greenhouse gas reduction

[13] "Potkin ¶ __, Ex. __" refers to the Declaration of Marc L. Potkin and the specific exhibit thereto, which were submitted in support of Plaintiffs' Motion for Preliminary Injunction.

programs. *GenOn*, 650 F.3d at 1024. The Fourth Circuit concluded that such an excise tax was clearly adopted in order to advance the county's program of reducing greenhouse gas emissions. *Id*. at 1025. The Court rejected the county's argument that the excise tax was not regulatory because it did not compel any standards of conduct by emitters, stating that "[t]he regulatory toolbox is not so limited." *Id*. at 1026. Courts have recognized that "[t]he classic regulatory fee . . . may serve regulatory purposes directly by, for example, deliberately discouraging particular conduct by making it more expensive." *Id*. (citations omitted).

Here, the stated purpose of the New Levy was to replace the expired Contract Payments from Entergy that previously funded the CEDF. For fiscal year 2013, the amount of the New Levy appropriated to the CEDF is $3 million. 2011 Vt. Acts & Resolves No. 162 (H.B. 781) § D.108(a)(2); H.B. 782 2012 Miscellaneous Tax Bill Fiscal Estimates Conference Committee Report, Sec. 58. As explained above, the purpose of the CEDF is "to promote the development and deployment of cost-effective and environmentally sustainable electric power and thermal energy or geothermal resources for the long-term benefit of Vermont consumers, primarily with respect to renewable energy resources, and the use of combined heat and power technologies." Vt. Stat. Ann. tit. 30 § 8015(c); Compl. ¶ 35. The monies in the CEDF may only be used for such purposes and specifically "*shall not be used for the general obligations of government*." Vt. Stat. Ann. tit. 30 § 8015(a)(2) (emphasis added).

Accordingly, the New Levy serves the purposes of the CEDF to promote renewable energy projects. These purposes are regulatory in nature and, therefore, just like the "excise tax" at issue in *GenOn*, the New Levy "sounds in . . . a regulatory scheme." *GenOn*, 650 F.3d at 1025. Any "indirect benefit" that may accrue to Vermont's general populace through renewable

energy projects is not the type of public benefit that makes an assessment a "tax." *Bidart Bros.*, 73 F.3d at 932-33.

Beyond the expressly stated purpose of the New Levy to replace the Contract Payments, the New Levy is also clearly just another chapter in Vermont's continuing campaign against Vermont Yankee Station—if not by forcing it to shut down prematurely, then by putting increased financial pressure on it.[14] Furthermore, by funding alternative energy projects through the CEDF, the New Levy takes money from Plaintiffs and gives it to their competitors. Such punitive purposes are distinct from a legitimate purpose to raise revenue that is the hallmark of a true tax. *GenOn*, 650 F.3d at 1026 (concluding that the fact that the "excise tax" "targets a single emitter and is located squarely within the County's own 'programmatic efforts to reduce' greenhouse gas emissions' is a punitive and regulatory fee over which the federal courts retain jurisdiction") (internal citation omitted). For these reasons, the third factor under the *San Juan Cellular* test weighs heavily in favor of a finding that the New Levy is not a tax for purposes of the TIA.

d. Summary and Additional Considerations

Under the circumstances of this case, the New Levy is not a "tax" for purposes of the TIA. The *San Juan Cellular* factors require a determination that the New Levy is not a tax for purposes of the TIA because it was adopted to collect revenue solely from Entergy, a politically unpopular business in Vermont, in order to fund a regulatory program designed to promote renewable energy projects. In addition, since the *San Juan Cellular* three-prong test does not constitute an exhaustive framework for determining whether the TIA applies to a given

[14] According to Defendant Governor Shumlin, "We're doing all we can so that Vermont can move on from this old plant and move towards an energy future that sends Entergy Louisiana back to Louisiana." Cho ¶ 15, Ex. 14. *See also* "Hundreds Gather to Protest Vt. Nuclear Plant," April 15, 2012. Cho ¶ 16, Ex. 15.

assessment, *ACLU of Ill.*, 692 F. Supp. 2d at 990, it is critical to consider two factors that are unique to the New Levy.

First, the Vermont General Assembly has expressed its intent to replace the expired Contract Payments through the enactment of the New Levy. Since payments under a contract are not a "tax" for purposes of the TIA, *ACLU of Tenn.*, 441 F.3d at 373-74, the attempt to unilaterally extend the expired payments under the 2003 MOU and 2005 MOU, through the enactment of the New Levy, also cannot be considered a "tax" for purposes of the TIA. This is especially true given the fact that the Court of Appeals for the Federal Circuit has recognized the contract payments under the 2005 MOU to be "a form of blackmail," *Federal Damages Action*, 683 F.3d at 1346. The legislative replacement of payments identified as "blackmail" is not a proper expression of a state's taxing power, and a state can hardly claim a *bona fide* interest in being left to its own devices to extend the economic benefits of such improper actions through a purported "tax."

Second, it is also important to consider the unique, interstate nature of the matters before the Court in Entergy's Complaint. In a nearly identical context in *GenOn*, the Fourth Circuit was deeply troubled by the prospect of having these kinds of issues decided by local courts. *GenOn*, 650 F.3d at 1026. The Fourth Circuit explained:

> We cannot overlook the fact that the absence of federal jurisdiction in this case would turn what are truly interstate issues over to local authorities. Applying the Tax Injunction Act might encourage punitive financial strikes against single entities with national connections, for the federal courts would be unavailable to protect companies against local discrimination, preempted state laws, and other federal constitutional violations. The implications of allowing localities to impose financial exactions exclusively upon single entities of national reach with no accountability in federal court are profound, and we decline to foreclose these federal claims with a jurisdictional bar.

Id. Entergy respectfully submits that this Court should not overlook the profound implications of declining to hear a constitutional challenge to an exaction against a "class of one"—a business with "national connections" devoted to providing electrical power to an entire region of states exclusively in interstate commerce. This concern is only heightened in light of the express terms of 15 U.S.C. § 391, which reflects particular Congressional concerns about state interference in national energy policy.

This Court should hear this case.

B. There Is No Plain, Speedy and Efficient Remedy in the Vermont Courts for Plaintiffs' Constitutional Challenge to the New Levy

The salient portions of the New Levy's imposition provision, Vt. Stat. Ann. tit. 32 § 8661, provide:

> Tax levy. (a) There is hereby assessed upon electric generating plants constructed in the state subsequent to July 1, 1965, and having a name plate generating capacity of 200,000 kilowatts, or more, a state tax at the rate of $0.0025 per kWh of electrical energy produced. The tax imposed by this section shall be paid to the commissioner on the electrical energy generated in the prior quarter on or before the 25th day of the calendar month succeeding the quarter ending on the last day of March, June, September, and December by the person or corporation then owning or operating such electric generating plant. (b) A person or corporation failing to make returns or pay the tax imposed by this section within the time required shall be subject to and governed by the provisions of sections 3202 and 3203 of this title.

1. There Is No Certain Vermont State Court Remedy for Challenging the New Levy

The TIA is inapplicable for the additional reason that Entergy's remedies in Vermont's state courts are uncertain. "Where there is uncertainty as to the adequacy of a state remedy, the Tax Injunction Act does not apply." *Alcan Aluminium, Ltd. v. Dep't of Revenue*, 724 F.2d 1294, 1297 (7th Cir. 1984) (citing *California v. Grace Brethren Church*, 457 U.S. 393, 414 n.31 (1982)).

Defendants claim that Entergy possesses two remedies that satisfy the TIA. First, Defendants claim that Entergy may file an administrative refund claim that, if denied, may be appealed to the Vermont Superior Court. Def. Mot. at 6. Second, Defendants claim that Entergy may withhold payment of the New Levy and avail itself of "an appeal to Vermont's Commissioner of Taxes" after it protests a notice of deficiency. Def. Mot. at 6. Defendants assert that, as with the refund claim, if the appeal against the notice of deficiency is denied by the Commissioner, then Entergy may appeal that adverse decision to the Vermont Superior Court.

Defendants' allegations are not correct. With regard to the New Levy, neither of these purported remedies is anywhere near "certain."

2. The State Has Not Afforded a Statutory Refund Claim for the New Levy

Conspicuously absent from the Defendants' Motion to Dismiss and Memoranda of Law is any citation to a statute that plainly confers upon Plaintiffs the right to claim a refund of the New Levy. This is not by accident because there is no such statute.

For the proposition that a refund statute exists, Defendants appear to rely, first, upon Vt. Stat. Ann. tit. 32 § 3203. The salient portion of that statute states:

> If the commissioner finds that any taxpayer has failed to discharge in full the amount of any tax liability incurred under this title or has claimed a refund in error or that a penalty or interest should be assessed under this title, the commissioner shall notify the taxpayer of the deficiency or denial of refund or assess the penalty or interest, as the case may be, by mail.

Id.

This is not a refund statute. All this statute commands is that the Commissioner make notification of certain occurrences. Nowhere does this statute expressly waive Vermont's sovereign immunity so that the Plaintiffs may recover payments of the New Levy from the State nor does the statute create the procedures necessary for a refund action.

Vermont's General Assembly knows how to clearly craft refund statutes that waive the State's sovereign immunity when it intends that result. For example, the General Assembly has clearly and unequivocally waived sovereign immunity with respect to refunds of income taxes. Vt. Stat. Ann. tit. 32 § 5884.[15] That provision is restricted to Chapter 151 found in Part 3 (Income and Franchise Taxes) and, accordingly, does not apply to the New Levy. Similarly, even with respect to taxes imposed in the same Part 5 (Special Taxes) in which the New Levy is found, the General Assembly enacted explicit waivers of sovereign immunity to permit refunds when it deemed them appropriate. For example, Part 5, Chapter 233, Sales and Use Tax, contains a provision, Vt. Stat. Ann. tit. 32 § 9781, which is similar to that applicable to income taxes, Vt. Stat. Ann. tit. 32 § 5884. Refund provisions also exist under other Special Taxes found under Part 5. *See, e.g.*, Vt. Stat. Ann. tit. 32 §§ 7819 (Tobacco Products Tax); 8914 (Motor Vehicle Purchase and Use Tax); 9245 (Meals and Room Tax); 9781 (Sales and Use Tax); 10107 (Tax on Hazardous Waste Generation). No such provision allowing refunds is included with regard to the New Levy and one cannot be imputed.

Defendants may also argue that Vt. Stat. Ann. tit. 32 § 3203 itself should be read to imply a waiver of Vermont's sovereign immunity so that Entergy may claim a refund of New Levy. This is erroneous for two reasons. First, for a statute to validly extend a right to a refund that waives sovereign immunity, the statute must be unmistakably clear in this respect. "In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will

[15] "At any time within three years after the date a return is required to be filed under this chapter [income tax], or six months after a refund was received from the United States with respect to an income tax liability, or an amount of taxable income, under the laws of the United States, reported in a return filed under the laws of the United States for the taxable year, with respect to which that return was filed under this chapter, whichever is later, a taxpayer may petition the commissioner for the refund of all or any part of the amount of tax paid with respect to the return." Vt. Stat. Ann. tit. 32 § 5884.

find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909)). *Accord Dale v. Vermont*, 630 F. Supp. 107, 113-14 (D. Vt. 1986); *LaShay v. Dep't of Soc. & Rehab. Servs.*, 160 Vt. 60, 67 (1993) ("Sovereign immunity protects the state from suit unless immunity is expressly waived by statute"). It is difficult to conceive that a statute commanding the Commissioner to make administrative notifications somehow represents "express language" or contains "overwhelming implications" that Vermont has waived its sovereign immunity and permits refunds of the New Levy. Second, consistent with the jurisprudence involving waivers of sovereign immunity, where a refund claim could potentially be implied, "all doubts must be resolved against the implication of a taxpayer claim." *United States Satellite Broad. Co. v. Lynch*, 41 F. Supp. 2d 1113, 1119 (E.D. Cal. 1999). Nothing in this statute provides an affirmative refund remedy.

It is clear that Vermont law does not provide for a refund claim of the New Levy, which, under principles of sovereign immunity, means that Vermont courts cannot consider such a claim.

3. There Is No Mechanism to Review Refund Denials

Given that there is no provision for refunds in the New Levy, it comes as no surprise that the New Levy contains no provisions to review denials of such claims. Defendants refer to two provisions—Vt. Stat. Ann. tit. 32 §§ 5883 and 5885—and claim that they provide remedies. However, neither of these provisions is included in or even referenced by the New Levy. Rather, they are in separate sections of the tax law addressing income taxes. While Defendants appear to be suggesting these provisions would have general applicability to other taxes, Sections 5883 and 5885 do not appear in the sections addressing general tax administration, as Sections 3202 and

3203 do. Further, that suggestion is not supported by the construction of the statute or by other explicit remedies that are provided for other taxes and impositions including those in Chapters contained in the same Part (Special Taxes) as the New Levy. Significantly, when the General Assembly wanted the administrative provisions of Chapter 151 to apply to a tax outside Chapter 151, it clearly expressed its intent. *See, e.g.*, Vt. Stat. Ann. tit. 32 § 10009(b) ("All the administrative provisions of chapter 151 of this title, including those relating to the collection and enforcement by the commissioner of the withholding tax and the income tax . . . shall apply to the tax imposed by this chapter.").

Likewise, the General Assembly knows how to provide review procedures that extend to refund denials under other Special Taxes found in Part 5: Meals and Room Tax (Vt. Stat. Ann. tit. 32 § 9274); Sales and Use Tax (Vt. Stat. Ann. tit. 32 §§ 9777, 9781); Tax on Hazardous Waste (Vt. Stat. Ann. tit. 32 § 10109). No similar provision applies to the New Levy and Defendants cite none.

However, not all of the taxes imposed by the General Assembly allow refunds (that is, as to these taxes, the State has decided not to waive its sovereign immunity) and some taxes allow for refunds, but have no review procedure. *See, e.g.*, Floor Stock Tax (Vt. Stat. Ann. tit. 32 § 7819, provides for a refund, but Section 7817, which contains deficiency review procedures, does not extend to refunds); Motor Vehicle Purchase and Use Tax (Vt. Stat. Ann. tit. 32 § 8914 provides for the refund of overpayments, but Section 8922 limits the availability of hearings to assessments of deficiencies); Tax on Transferors of Nursing Homes (Vt. Stat. Ann. tit. 32 § 9535 provides for review and appeals, but there is no explicit right to refund).

It is abundantly clear that the State has determined not to waive its sovereign immunity with respect to the New Levy, and thus the New Levy is devoid of a provision allowing the sole

taxpayer under the New Levy to file a refund claim. Given that no refund claims are allowed, the absence of a review procedure in the New Levy to address denials of such claims is to be expected.

4. There Is No Plain Procedure for Review of Deficiency Notices Involving the New Levy

The shortcomings of the refund mechanism are equally present for a procedure involving the withholding of payment. Defendants claim that Plaintiffs may withhold payment of the New Levy, and avail themselves of "an appeal to Vermont's Commissioner of Taxes" pursuant to a protest against a notice of deficiency. Def. Mot. at 6. Defendants assert that if the appeal against the notice of deficiency is denied by the Commissioner then Entergy may appeal that adverse decision to the Vermont Superior Court and have all of its Constitutional claims heard there. This too is erroneous.

Once again, Defendants rely on the provisions contained in the income tax law, Vt. Stat. Ann. tit. 32 §§ 5883 and 5885. As discussed above, these provisions simply have no applicability to the New Levy.

Even assuming, *arguendo*, that Vt. Stat. Ann. tit. 32 § 5883 validly permits Plaintiffs to petition for administrative review of a notice of deficiency regarding the New Levy and ask "for a determination of that deficiency," such a process does not satisfy the TIA. Assuming that Plaintiffs disagree with the "determination," they presumably may, as Defendants illustrate, "appeal that ***determination*** to the Washington superior court or the superior court of the county in which the taxpayer resides or has a place of business." Vt. Stat. Ann. tit. 32 § 5885(b) (emphasis added). This statute provides the exclusive basis for the jurisdiction in the Vermont Superior Courts in cases of these appeals. As plainly indicated by the unambiguous terms of section 5885(b), the jurisdiction of the Vermont Superior Courts is limited to the "determination"

made by the Commissioner. As Defendants have conceded,[16] the Commissioner is not empowered to make determinations of the constitutionality of statutes. Therefore, if the Commissioner cannot "determine" the constitutionality of a statute, and if the jurisdiction in the Vermont courts is limited to the Commissioner's "determination," it simply follows that the Vermont courts will not be able to pass upon questions of the constitutionality of statutes administered by the Commissioner. This precise problem appears to have troubled the Second Circuit in *Barringer v. Griffes*, 964 F.2d 1278 (2d Cir. 1992), leading that court to find that Vermont had not provided a plain remedy for purposes of the TIA:

> Because the Commissioner apparently cannot consider the constitutional validity of the tax statute, judicial review of his decision may be limited to the matters actually decided which would not afford full protection to the Barringers' constitutional rights.

Id. at 1283-84. In short, Plaintiffs have no ability to raise their constitutional claims in a Vermont court.[17]

To be clear, this is not a case about the "constitutional applicability" of the New Levy. As noted in the Complaint, this is case is about the fundamental *constitutionality* of the New

---

[16] "[T]he Commissioner is not authorized to declare a state statute unconstitutional." Def. Mot. at 6.

[17] In *Murray v. McDonald*, 157 F.3d 147, 148 n.2 (2d Cir. 1998), which, as explained below, involves a different statute with a specific review provision, the Second Circuit appears to rely on an argument by the State's counsel which "assumes that, following such administrative proceedings, state court jurisdiction will lie and will extend to constitutional claims." No basis is provided for this "assumption," and no statute is cited, other than provisions allowing an appeal to the small claims court from proceedings before the Commissioner of Motor Vehicles. Insofar as the New Levy is concerned, nothing in *Murray* appears to change the observation in *Barringer* that the courts provide no certain remedy, leaving the court in *Barringer* with "the uneasy feeling that if there is a judicial remedy available to the Barringers in Vermont, it cannot fairly be said to be plain." *Barringer*, 964 F.2d at 1284. While Plaintiffs do not believe this Court needs to reach the argument about court review of constitutional claims in order to conclude that the TIA does not apply, Plaintiffs contend that the "assumption" made in *Murray* does not apply in the instant case.

Levy. The Commissioner, by Defendants' own concessions and by clear Vermont precedent, is legally incapable of making a "determination" with respect to Plaintiffs' claims. *Stone v. Errecart*, 165 Vt. 1 (1996). If the jurisdiction of the Superior Court is premised entirely upon the "determination" made by the Commissioner, and the Commissioner cannot determine the constitutionality of the New Levy, then the Vermont Superior Court lacks jurisdiction to hear these Constitutional claims. *See also Travelers Indem. Co. v. Wallis,* 2003 VT 103 (2003) (no jurisdiction in superior court on questions of the constitutionality of a statute where the agency is given primary jurisdiction to resolve controversies and declaratory relief is likewise unavailable).

Neither Section 5885 nor any other provision provides a "plain" remedy in Vermont courts with respect to the New Levy for purposes of the TIA.

5. Entergy Could Not Maintain This Action Directly in a Vermont Court.

In certain other states, the availability of a declaratory judgment action for a plaintiff challenging the constitutionality of a state imposition has been held to represent an adequate state remedy. *See, e.g., Tully v. Griffin, Inc*., 429 U.S. 68 (1976) (New York's declaratory judgment procedures deemed adequate). In the instant case, Defendants do not even raise such an alternative, presumably because they recognize that no such remedy exists in Vermont. The Declaratory Judgments Act ("DJA"), Vt. Stat. Ann. tit. 12 § 4711, is inapplicable under these circumstances.

The Vermont Supreme Court has plainly stated that the DJA, as a remedial power vested in Vermont's courts, does not provide an independent basis for jurisdiction. "Where the Legislature has provided that certain rights… are enforceable in specified tribunals…, the declaratory judgments vehicle should not be used to frustrate that legislative choice. To do so would be to ignore the message of 12 V.S.A. § 4711 and our prior holdings that the [DJA] has

not enlarged the subject matter jurisdiction of the courts." *Trivento v. Comm'r of Corr.*, 135 Vt. 475, 478 (1977). As the Vermont Supreme Court has indicated, a taxpayer cannot use the DJA to skirt the requirement to exhaust administrative remedies and legislative choice of forum, even if doing so is futile because the administrative agency in question is not capable of hearing the taxpayer's claims. "Plaintiffs' argument that exhaustion is not required when a constitutional challenge has been raised fails even though the administrative decision makers do not have the authority to strike down the valuation methods as unconstitutional." *Town of Bridgewater v. Vt. Dep't of Taxes*, 173 Vt. 509, 511 (2001).

The DJA does not provide a "plain" remedy in the Vermont state courts for purposes of the TIA. Seeking relief through the DJA is at least as fraught with peril as the methods that Defendants claim. The DJA is at least "uncertain" for purposes of the TIA.

6. Analysis of the Defendants' Authorities, Summary, and Other Considerations

a. Analysis of Defendants' Authorities.

The cases cited by Defendants to support their assertion that Vermont's tax assessment review process satisfies the TIA's plain, speedy, and efficient remedy requirement have no relevance to the New Levy because they address remedies applicable to different exactions. *See, e.g., Murray v. McDonald*, 157 F.3d 147, 148 (2d Cir. 1998) (court found that taxpayers had "a plain, speedy and efficient remedy" because "the state has represented to us that an appeal as of right will lie from the small claims court to the superior court," a remedy explicitly provided by 1994 Vt. Acts & Resolves No. 223, § 4, to challenge motor vehicle use tax assessments). The addition of this motor vehicle use tax procedure was critical to the outcome because the Second Circuit held that the prior version of the motor vehicle use tax, which lacked this procedure, did not offer a "plain, speedy, and efficient remedy." *See Barringer*, 964 F.2d at 1282-83.

In this case, Plaintiffs have no remedy in the small claims court, and Defendants do not contend otherwise. Thus, the uncertainty concerning adequate review of constitutional claims that worried the Second Circuit in *Barringer* is equally troubling here.

Similarly in *Hoffer v. Ancel*, No. 1:01-cv-93, slip op. (D. Vt. June 27, 2001), Judge Murtha held that there was a plain, speedy, and efficient remedy under the Homestead Property Tax, which, in stark contrast to the New Levy, expressly provided in Vt. Stat. Ann. tit. 32 § 6072 for the right to challenge the tax.[18]

Defendants even suggest that an administrative challenge brought under a "previous version" of the New Levy somehow serves to establish the existence of a plain, speedy, and efficient remedy in the *courts* of the State. Def. Mot. at 4, 7. Conspicuously lacking from the prior administrative challenge to which Defendants refer is citation to any of the provisions that Defendants now claim provide the path for review in the *courts* of the State. Neither Vt. Stat. Ann. tit. 32 § 5883 nor Vt. Stat. Ann. tit. 32 § 5885 was relied upon in the administrative proceeding addressing the prior version of the statute and, as previously stated, a careful reading of the current statute establishes that neither one provides a remedy for the New Levy in Vermont's courts. Moreover the decision itself, to the extent it purports to rule on the constitutionality of the prior statute and bear in any way on this matter, is inconsistent with

[18] "Any person aggrieved by the denial, in whole or in part, of relief claimed under this chapter, except when the denial is based upon late filing of claim for relief, may appeal to the commissioner by filing a petition of appeal within 60 days after the denial. This appeal shall be a person's exclusive remedy for denial of a benefit claimed under this chapter. The commissioner's determination may be further appealed in the manner described in subsection 5885(b) of this title." Thus, unlike the New Levy, this provision expressly incorporates § 5885.

Vermont law, which, as Defendants themselves concede, prohibits administrative agencies from determining the constitutionality of a statute. Def. Mot. at 6.[19]

Plaintiffs respectfully submit that oral assurances from Defendants' litigation counsel that an adequate review procedure is available simply do not suffice as a "plain, speedy and efficient" remedy. As noted, the Executive Branch of the State is not entitled, by oral representation or otherwise, to grant jurisdiction in state court or to rewrite statutes so that Plaintiffs may have a remedy in a state court. The TIA simply does not permit Defendants to make up the rules as they go along. Where, as here, a state statute lacks a review procedure, a "hypothetical possibility of a cause of action" should not be found, and the court should not interpret the statute to "'imply'" that an action exists. *United States Satellite*, 41 F. Supp. 2d at 1119.

b. Summary and Other Considerations

Plaintiffs have no remedy in the Vermont courts, either through an administrative deficiency procedure, through the DJA, or through an administrative refund procedure. *United States Satellite* warrants special consideration in this respect. In that case, as in the present case, plaintiff instituted an action under 42 U.S.C. § 1983 to have a state exaction declared

[19] Apart from not addressing the issue of a statutory right of review for the New Levy, the administrative decision referenced by Defendants, and attached to their Motion to Dismiss as Exhibit B ("Def. Ex. B"), is entitled to no weight for additional reasons. The administrative decision is not publicly available, and appears to contain confidential tax information protected, under penalty of law, from disclosure under both state and federal statutes. Vt. Stat. Ann. tit. 32 § 3102 and 26 U.S.C. § 6103. In response to Plaintiffs' counsel's questions to Defendants' counsel regarding confidentiality, and requesting a complete copy of the file, Defendants' counsel advised that they believe an exception to the confidentiality rules permit their disclosure and use of the document, and that the record related to the administrative decision has been destroyed due to the passage of time. Thus, Plaintiffs' counsel have not been able to access the complete file in this matter. Without this access, Plaintiffs are unable to fully respond to Def. Ex. B. In particular, Plaintiffs are unable to determine—and the Court is unable to evaluate—whether the matter reflected in Def. Ex. B was withdrawn, settled, or otherwise compromised, or whether the apparent inconsistency between the Commissioner's action and his lack of authority to determine constitutional issues was even raised in the proceeding.

unconstitutional and enjoined from operation. 41 F. Supp. 2d at 1116. As in the present case, the law in question "contain[ed] no express scheme for the refunding or challenging of an illegal or erroneous tax." *Id.* at 1118. Moreover, as in the present case, the taxpayers could not secure declaratory and injunctive relief because state authority prohibited it. As in the present case, the State attempted to imply remedies that did not exist. On the basis of these circumstances, the Court held that the TIA did not apply because "[p]laintiff thus could not maintain a § 1983 action for refund of the tax in state court. In fact, it appears plaintiff has challenged the tax by the only means available to it." *Id.* at 1119-20.

United States Satellite provides useful guidance. Here, Plaintiffs bring a § 1983 action to enjoin the Defendants from enforcing the New Levy because Plaintiffs have no other certain alternatives in Vermont courts. As the *United States Satellite* Court observed, Plaintiffs here have challenged the New Levy by the only means available to them.

Moreover, as the *United States Satellite* Court suggested, the touchstone is whether a plaintiff can maintain an action for refund. As another court observed, "[t]he parties have not cited, and the Court is unable to find, any authority wherein a state remedy was deemed 'adequate,' unless the statute provided for a right to bring suit in order to recover the payment of a challenged tax. Case authority reveals that a state remedy cannot be deemed 'adequate' unless the state has provided a statutory right to recover tax payments which were wrongfully collected." *Am. Trucking Ass'ns v. O'Neill*, 522 F. Supp. 49, 54 (D. Conn. 1981) (citing, *inter alia*, *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 301 (1943); *Procter & Gamble Distrib. Co. v. Sherman*, 2 F.2d 165, 166 (2d Cir. 1924); *Tully v. Griffin, Inc.*, 429 U.S. 68, 74, (1976)).

Plaintiffs have no access to deficiency procedures that would allow a Vermont court to hear their claims and they do not have access to relief under the DJA. Most importantly, Plaintiffs have no access to a refund statute, which, as illustrated by both *United States Satellite* and *O'Neill*, is required to find that Plaintiffs have an adequate remedy for the purposes of the TIA.

Plaintiffs have no plain remedy in a Vermont court for purposes of the TIA.

II. PRINCIPLES OF FEDERAL-STATE COMITY DO NOT REQUIRE DISMISSAL

Defendants assert that even if the TIA does not bar Plaintiffs' claims in this case, this court should refrain from hearing this case based upon principles of comity. Def. Mot. at 8. Defendants' argument, which is devoid of analysis and takes up less than a page in the memorandum in support of Defendants' motion, is wrong on several accounts.

First, it is important to note that comity is not a jurisdictional bar; it is a court-made prudential doctrine of judicial restraint, to be exercised in the Court's discretion only when necessary. *See Levin v. Commerce Energy, Inc.*, 130 S. Ct. 2323, 2336 (2010).

Second, a precondition for application of the comity doctrine is that the party challenging the state tax must be able to proceed with its action in state court whether or not the administrative agency in question is capable of granting relief. *See, e.g.*, *id.* at 2328 ("The comity doctrine, we hold, requires that a claim of the kind here presented proceed originally in state court."); *id.* at 2334. In *Levin*, the parties agreed "that there is an adequate state-court remedy available." 554 F.3d 1094, 1096-97 n.2 (6th Cir. 2009); *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 116 (1981) ("plaintiffs such as petitioners may assert a § 1983 claim in state court"); *id.* at 109 (noninterference "where the Federal rights of person could otherwise be preserved unimpaired"). Here, this precondition is not met for the reasons discussed above at 23-25. Accordingly, the comity doctrine does not apply.

Third, the challenge to the exaction in this case arises in an area of heightened federal interests. Congress, pursuant to its plenary power over commerce, has expressly singled out the generation and transmission of energy for protection against discriminatory impositions by enacting 15 U.S.C. § 391 ("Section 391"), which provides:

> No state, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For the purposes of this section a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

The Complaint alleges that the New Levy is in conflict with Section 391—and, therefore, is preempted—because it imposes what Vermont describes as a "tax" with respect to the generation or transmission of electricity and discriminates against electricity transmitted in interstate commerce.[20] Given that Congress has singled out electrical energy generation for special protection from state interference—and state interference is precisely what is alleged in the Complaint—the reasons for federal restraint are less compelling and the federal interests are greater in this case than they would be in cases challenging other types of exactions.

Fourth, the comity doctrine in the tax context stems from the deference shown to states in matters of taxation. *Levin*, 130 S. Ct. at 2333 ("in taxation, even more than in other fields, legislatures possess the greatest freedom in classification") (quoting *Madden v. Kentucky*, 309 U.S. 83, 88 (1940)). Such deference is not warranted here because the New Levy is not a true "tax." Rather, as explained above, it is more akin to a "fee," "penalty," or exaction designed to

[20] We note that the question of whether an imposition is a "tax" for the purpose of Section 391 must be considered under the case law interpreting that statute, which is distinct from the case law under the TIA.

replace payments described by the Federal Circuit as "blackmail." Furthermore, because the New Levy is not a tax for TIA purposes, the TIA does not apply to "limit[] . . . the remedial competence" of this Court, which is one of the factors identified as weighing in favor of declining jurisdiction on comity grounds in typical tax cases. *See id.* at 2334.

Fifth, because of the unusual nature of the New Levy, this case does not implicate the concern that federal jurisdiction in a state tax case would cause potential for disruption with the operations of the state by impeding the administration of state taxation. *See id.* at 2328 (the "comity doctrine … restrains federal courts from entertaining claims for relief that risk disrupting state tax administration"); *Perez v. Ledesma*, 401 U.S. 82, 127-28 n.17 (1971) (concurring in part and dissenting in part) ("The procedures for mass assessment and collection of state taxes and for administration and adjudication of taxpayers' disputes with tax officials are generally complex and necessarily designed to operate according to established rules.… If federal declaratory relief were available to test tax assessments, state tax administration might be thrown into disarray..."). Even if the New Levy were a "tax," consideration of Plaintiffs' claims in this Court would not present any risk of mass disruption to the administration of the Vermont tax system because the decision on Plaintiffs' claims would impact only one "taxpayer."

Finally, while the Supreme Court has stated that the comity doctrine is "more embracive" than the TIA, *Levin*, 130 S. Ct. at 2328, it is an unusual situation, and perhaps even unprecedented, for comity to apply where a challenge to a state exaction that is not barred by the TIA (because the exaction in question is not a tax) would nonetheless be dismissed on comity grounds. In *Levin* and *Joseph v. Hyman*, 659 F.3d 215 (2d Cir. 2011), plaintiffs challenged tax *exemptions*, and success on the merits of their claims invalidating those exemptions would have resulted in more, not less, revenue to the state. *See Levin*, 130 S. Ct. at 2328-29; *Joseph*, 659

F.3d at 217. Because plaintiffs in those cases were not seeking to enjoin the assessment or collection of taxes, the TIA simply did not apply. However, because the comity considerations underlying the TIA (insofar as they related to as concerns about interfering with the operation of the state tax system) were still present, the courts applied the comity doctrine. In each of those cases, a decision by the federal court striking the state's exemption would have had broad application to a class of taxpayers and to the state's taxing system: in *Levin*, on all local distribution companies selling natural gas that received three state tax exemptions at issue there, and in *Joseph*, on all local residents who received the parking tax exemption. *Levin*, 130 S. Ct. at 2329, 2335; *Joseph*, 615 F.3d at 217, 219, 220. Here, Plaintiffs' challenge is to the imposition of the New Levy, which only applies to them—a situation that, as noted above, does not implicate comity's concern about non-interference in the administration of state taxes.

In sum, Plaintiffs respectfully submit that the comity overlay that Defendants propose adds nothing to the analysis of whether this case should remain in federal court. For the same reasons that TIA does not divest this Court of jurisdiction, the comity doctrine does not apply either.

CONCLUSION

For the foregoing reasons, this Court should deny Defendants' motion to dismiss pursuant to Rule 12(b)(1) and proceed to consider Plaintiffs' motion for preliminary injunction. The Tax Injunction Act does not divest this Court of jurisdiction because (a) the New Levy is not a "tax" for purposes of the statute, and (b) Vermont law provides no "plain, speedy and efficient remedy" for determination of Plaintiffs' constitutional claims in the courts of the state. Moreover, there is no basis for this Court to refrain from hearing this case under the discretionary doctrine of comity. Accordingly, this Court should exercise the authority granted

to it by Congress to hear Plaintiffs' claims for protection of their rights under the United States Constitution.

Dated: Burlington, Vermont
October 9, 2012

/s/ Matthew B. Byrne
Robert B. Hemley, Esq.
Matthew B. Byrne, Esq.
Gravel & Shea PC
76 St. Paul Street, 7th Floor, P.O. Box 369
Burlington, VT 05402-0369
(802) 658-0220
rhemley@gravelshea.com
mbyrne@gravelshea.com
For Plaintiffs

Of Counsel:

Hollis L. Hyans
Thomas H. Steele
Robert A. Salerno
Morrison & Foerster LLP
1290 Avenue of the Americas
New York, NY 10104-0500
(212) 468-8000

Alan C. Gutierrez
Steven E. Goerner
Entergy Services, Inc.
2001 Timberloch Place, Suite 2N
The Woodlanads, TX 77380

sf-3204357